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No. 85-287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

COURT HOUSE PLAZA COMPANY, a limited partnership,
Petitioner,

VS.

THE CITY OF PALO ALTO,
a municipal corporation, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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44 pp

QUESTION PRESENTED

Whether California law of *res judicata* precludes the present action for inverse condemnation damages under the California Constitution by reason of a final judgment on the merits against petitioner and in favor of respondents in a prior state court action which adjudicated the same facts, same cause of action and same constitutional provision and held that there was no inverse condemnation?

No question of federal law is presented.

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STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner is seeking review in this Court for the third time in this lengthy, eight year, vexatious litigation against the same respondents. On the two previous occasions, this Court denied review. A brief recapitulation of the history of this litigation will demonstrate the frivolity of this third petition, and the absence of any issue that would permit this Court to take jurisdiction of this case.

Briefly, the facts pertinent to this proceeding are as follows.[1]

[1] Petitioner's Statement of the Case (Petition ("Pet.") pp. 2-5) fails to give a complete picture of the case because, on its face, it is limited to the facts alleged in the complaint in the present action (*"CHP II"*). The

In 1964, respondent City of Palo Alto, at petitioner's request, zoned petitioner's property for construction of an office building and garage in two phases. The zoning ordinance required that construction of Phase 1 (4-story office building and garage) be started by 1966, and that Phase 2 (6 more floors on the same office building) be started by 1976. Nothing in the ordinance stated that completion of Phase 1 vested any right to complete Phase 2. App. A, p. A-15, CL 3. The *CHP I* trial court found that the Phase 1 4-story building was

> "a self-contained, functional structure even without the additional six floors, and *has been occupied and used up to and including the present.*" (Emphasis added)

App. A, FF 13.

The trial court also found that petitioner "did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase I to accommodate it or in any other respect". App. A. FF 61, CL 12.[2] As to Phase 2, the court found that petitioner fully obligated itself to pay for Phase 2 costs before obtaining financing or a

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incompleteness is inconsistent with Rule 21.1(g) requiring the Petition to contain "facts material to the consideration of the question presented".

At this point, in compliance with Rule 34.1(g) requirements that respondents' statement of the case contain "all that is material to the consideration of the questions presented with appropriate references to . . . the record . . .", and pursuant to Rule 201 of the Federal Rules of Evidence, respondents respectfully request this Court to take judicial notice of the Appendices to this brief which contain copies of records of proceedings before the various courts that have considered and litigated this action and related state court actions referred to throughout this brief.

Appendix A to this brief sets forth detailed Findings of Fact ("FF") and Conclusions of Law ("CL") by the trial court in the first state court action between the same parties on the same cause of action. That action is called *"CHP I"* in this brief. The Findings and conclusions followed a 5-week trial in which respondents prevailed over petitioner.

[2] The Court of Appeal below also confirmed that the *CHP I* trial court "repeatedly rejected the notion that the developer acquired any vested rights" (Pet., App. B, p. B6), and that "no taking was found in the first

building permit therefor; and that this mistake, not any act of respondents, resulted in petitioner's financial problems. App. A, FF 20-23. There was no evidence of an anti-high rise philosophy on the part of respondents nor any intent to delay or obstruct petitioner. App. A., FF 23, 24, 32-37, 59-63, CL 15. As to respondents' refusal to extend the 1976 deadline for start of Phase 2, the trial court concluded that petitioner

> "... had not at any time acquired vested rights to a building permit to construct Phase 2; therefore, the (City's) denial of the one-year extension did not constitute a deprivation of vested rights."

App. A, CL 13.

Thus, *CHP I* clearly settled that petitioner had no reasonable, investment-backed expectation in Phase 2; that the City had not interfered with petitioner's property rights; and that petitioner has an economically viable use of the property. *Agins v. City of Tiburon*, 447 U.S. 255 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

In *CHP I*, petitioner first sought mandamus against respondent City of Palo Alto in California Superior Court, contending, inter alia, that its property had been taken in inverse condemnation under both the California and federal constitutions. The Superior Court denied relief; the California Court of Appeal affirmed; and the California Supreme Court denied review. Petitioner then sought federal review of the judgment of the Court of Appeal, but this Court denied certiorari. *Court House Plaza Co. v. City of Palo Alto*, 117 Cal. App. 3d 871 (1981), *treating appeal as pet. for certiorari, cert. den.*, 454 U.S. 1074 (1981).

Petitioner then brought a damage action in federal District Court, again contending that its property had been taken in inverse condemnation. The District Court found that the inverse condemnation claim had already been adjudicated adversely to petitioner in *CHP I*, and held the claim barred by *res judicata* under 28 U.S.C. section 1738 (and hence by *res judicata* under

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action, thus eliminating the premise for a damage award" (*Id.*, p. B7, fn. 2, and p. B8 (Conclusion)).

California law). The Court of Appeal for the Ninth Circuit affirmed in a one-sentence unpublished memorandum opinion. Petitioner sought review of the Ninth Circuit's decision, but this Court denied certiorari. *Court House Plaza Co. v. City of Palo Alto*, 464 U.S. 935 (1983). Petitioner refers to this suit as *CHP III*, and respondents adopt this nomenclature.

Three months after filing its damage action in federal District Court in *CHP III* petitioner filed an amended complaint for damages in California Superior Court, contending once again that its property had been taken in inverse condemnation. Petitioner refers to this suit as *CHP II*, and respondents adopt this nomenclature. The complaint in *CHP II* was identical to the complaint in *CHP III*. As the federal District Court in *CHP III* had done, the California Superior Court in *CHP II* found that the claim was barred by *res judicata* under California law because of the decision in *CHP I*. The California Court of Appeal below affirmed. Petitioner seeks review in this Court of the Court of Appeal Decision.

Petitioner, now petitioning this Court for the third time, contends that this case presents a substantive federal issue concerning the availability of damages in an inverse condemnation suit. As is apparent from the preceding summary and as will be explained in greater detail below, that issue is not present in this case. The only issue is one of California law—whether the California Court of Appeal correctly applied the California law of *res judicata*. This Court does not have jurisdiction to decide questions of state law when reviewing decisions of a state court.

B. Nature and Procedural History of the Present Action and Two Prior Related Actions

To fully appreciate that the present petition is limited to the *res judicata* issue, it is necessary to describe the present action and two prior related actions between the same parties on the same cause of action (i.e., *CHP I, II* and *III*).

1. ***Petitioner's First State Court Action ("CHP I"):*** **This Court Has Previously Denied Review of a State Court Final Judgment on the Merits, Against Petitioner and In Favor of Respondents, Following a 5-Week Trial Which Litigated the Same State Constitutional Claim and Predicate Facts Asserting Injury to Property as Are Alleged Herein.**

Petitioner originally brought an action in California state court in 1977 challenging respondents' legislative zoning decision denying permission to build six additional stories on a fully functioning, occupied four-story building. Petitioner alleged a breach of both state and federal constitutional rights, including an unconstitutional taking of property, and sought mandamus based on those claims.[3] Following full discovery and a 5-week trial, the trial court found that none of petitioner's constitutional rights had been violated.[4] The California Court of Appeal affirmed, concluding that there had been no taking of petitioner's property. *Court House Plaza Co. v. City of Palo Alto (CHP I)*, 117 Cal. App. 3d 871, 887-888 (1981). The California Supreme Court denied petitioner's petition for hearing. *CHP I*, 117 Cal. App. 3d at 888.[5]

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[3] The state constitutional taking or inverse condemnation claim was raised in paragraph 92 of the 61-page petition for writ of mandate in *CHP I*. (That petition is found at pages 113-174 of the Clerk's Transcript before the Court of Appeal below; and paragraph 92 is found at CT 170.) Paragraph 92 reads in pertinent part: " . . . Respondents have denied Petitioner the lawful use of its real property, *have taken the same without compensation . . . and in contravention of . . . the Constitution of the State of California* and the United States of America . . . ". The same taking claim is raised in the present action. Pet., App. A, p. A13, "Second Cause of Action", paragraph 27.

[4] Appendix A to this brief contains separately numbered "Findings of Fact and Conclusions of Law" of the state trial court in *CHP I*. They were also presented to and considered by both the trial court and the Court of Appeal below through judicial notice.

[5] *CHP I* resulted in a final judgment on the merits. Petitioner has never contended otherwise.

Petitioner then filed a Jurisdictional Statement in this Court seeking review of that judgment. Referring directly to its factual and constitutional taking claim that had been litigated adversely to it in all state courts in *CHP I*, petitioner contended:

> "The present case clearly presents the issue of whether California under the recent ruling in *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979) that a property owner's exclusive remedy is invalidation of the zoning regulation where the zoning regulation deprives the property owner of substantially all beneficial use of the real property right and is not entitled to an award of damages in an inverse condemnation proceeding . . . can deny [petitioner] any monetary compensation . . . ".

CHP I, No. 81-404, Jurisdictional Statement, pp. 11 and 13.[6] This passage frames the precise issue which Petitioner again seeks to revive in the present petition. Pet., Issues I and II, pp. 6-15.

However, this Court dismissed the appeal and, treating it as a petition for certiorari, denied the petition. *CHP I*, 454 U.S. 1074 (1981).

2. ***Petitioner's Federal Action ("CHP III")*: This Court Again Denied Certiorari After The Ninth Circuit Court of Appeals Affirmed Dismissal on Grounds of *Res Judicata* of Petitioner's Damage Action Alleging Identical Constitutional Taking Claims and Predicate Facts as *CHP I*.**

Three days after this Court denied certiorari in *CHP I*, Petitioner filed on December 3, 1981, an action in United States District Court seeking damages for violation of the identical

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[6] Petitioner also contended therein:

> "*The present case presents a factual situation which gives the Supreme Court jurisdiction to decide the monetary issue where the* Property *Owner has been foreclosed from any use of the rights to six additional stories* of a ten-story office building *by challenged zoning regulations and also has been foreclosed from monetary compensation.*" (Emphasis added) *CHP I*, No. 81-404, Jurisdictional Statement pp. 25-26.

federal and state consitutional taking provisions, based on the same underlying facts, as it alleged in *CHP I* (*"CHP III"*).[7]

On June 4, 1982, the District Court dismissed *CHP III* holding:

> "Because plaintiff's action is precluded by the *res judicata* effect of a prior judgment in state court [i.e., *CHP I*], plaintiff's action must be dismissed . . .
>
> "The federal claims here are based on the same alleged wrongful acts which formed the basis of plaintiff's state court mandamus action . . .
>
> "[T]he alleged violations of the federal constitution have been adjudicated in state court. The state court of appeal upheld the trial court's findings that the denial of the time extension [to build the six story addition] did not deprive plaintiff of equal protection or due process of law, *Court House Plaza v. City of Palo Alto*, 117 Cal. App. 3d at 883, *and the city's adverse zoning action did not constitute a 'taking' requiring compensation.* Id. at 888." (emphasis added)

App. B.

A three-judge panel of the Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's dismissal, on *res judicata* grounds, in a one sentence unpublished memorandum order on May 2, 1983. App. C. The Court of Appeals judgment is reported at 709 F. 2d 1515.[8]

Acting for the second time, this Court again denied a petition for writ of certiorari. 464 U.S. 935 (1983).

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[7] As a practical and sequential matter, this federal action followed next on the heels of *CHP I*. However, petitioner has referred to the federal action as *CHP III* in its petition (p. 5). Therefore, to avoid confusion, that designation will be used herein.

[8] The Court of Appeal below in the present action took judicial notice of the dismissal of *CHP III* because of the *res judicata* effect of *CHP I*. Pet., App. B, p. B3.

3. *Petitioner's Second State Court Action ("CHP II"):* The Trial Court Below Dismissed As *Res Judicata* The Present State Constitutional Taking Claim and Action, Which Is A Mirror Image of *CHP III*, and the Court of Appeal Below Affirmed.

On February 26, 1982, three months after this Court denied certiorari in *CHP I*, petitioner filed the present *CHP II* complaint seeking damages against the same defendants named in *CHP I* and *III*. *CHP II* is a verbatim copy of the *CHP III* complaint. Petitioner later reserved its federal claims, so that the court below had only a state claim before it.[9] Pet., App. A, p. A20. (CHP had not reserved any claims in *CHP I*.) However, as conceded by petitioner in its reservation, *CHP III*

> "states claims for relief that are in substance identical to the causes of action in the First Amended Complaint before this Court."(CT 280)

(The takings clauses of the United States and California Constitutions are virtually identical.)

The Court of Appeal below, commenting on the allegations of the *CHP II* amended complaint, emphasized that "[n]umerous allegations in the . . . complaint contradict the findings made in [*CHP I*]"[10]; that the trial court below had judicially noticed the *CHP I* mandamus petition, detailed findings and appellate opinion; and that, therefore, "[o]n demurrer, the court is not required to assume the truth of allegations which contradict what is judicially noticed". Pet., App. B, pp. B1-B2. The Court of Appeal also noted petitioner's concession that the facts in *CHP I* and *CHP II* were the same. *Id.*, p. B1.

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[9] Respondents filed a demurrer and motion to strike the first amended complaint in *CHP II*. Pet., App. A, pp. A18-19. Attached to their Memorandum of Points and Authorities in Support thereof were Exhibits A-K. See App. D to this brief, consisting only of the title page and page 1b listing those exhibits. Exhibits C-K are essentially the same exhibits that respondents presented to the federal District Court for judicial notice in connection with its motion to dismiss in *CHP III*.

[10] Those *CHP I* findings are set forth in Appendix A to this brief.

The trial court below took judicial notice of the holding of the Court of Appeal in *CHP I* "in which the court [of appeal] held that plaintiff was not entitled to compensable damages under a theory of inverse condemnation. Such damages would include any that flow from interference with use of air space." Pet. App. A, p. A21. It concluded that petitioner's claim was barred by *CHP I*:

> "[T]he demurrer to the second cause of action [state inverse condemnation] is sustained on the grounds that that cause of action is barred by *res judicata*. Since there is no basis for an amendment, the demurrer is sustained without leave to amend."

Ibid.[11]

The Court of Appeal below addressed and decided only the *res judicata* issue. As the Court noted at the outset: "The critical question in this appeal is: does that judgment [*CHP I*] bar the developer from seeking damages in inverse condemnation based on the same actions by the City? The trial court so decided . . . We agree with the [trial] court's decision." Pet., App. B, p. B1. Thus, the Petition is erroneous in stating that the Court of Appeal "concluded under *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272-277 (1979), affd. on other grounds, 447 U.S. 255 (1980)" that the appropriate remedy for a taking by excessive zoning regulations is not money damages but equitable relief. Pet., p. 5.

As is evident from the face of the opinion, the Court of Appeal's discussion of inverse condemnation was merely a historical preface to its holding on the single *res judicata* issue before it. Pet., App. B, pp. B3-B4. More specifically, the Court of Appeal, in that portion of the opinion, was simply explaining, for *res judicata* purposes, the nature of the cause of action or, in California *res judicata* terms, the primary right at issue in *CHP I*

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[11] The petition misstates the trial court's decision in that it indicates that the court held that petitioner "was not entitled to . . . damages under . . . inverse condemnation . . . *and* that *CHP II* was barred by *res judicata*." (Emphasis added.) Pet., p. 5. In fact, the trial court held that petitioner was not entitled to inverse condemnation damages *because CHP II* was barred by *res judicata*. Pet., App. A, p. A21.

and *II*, preliminary to its single holding that it was identical in both actions and that, therefore, preclusion applied. The Court of Appeal noted that the property right involved in *CHP I* was "clearly a right to develop property by building on it and presumably to profit . . . ". Pet, App. B, p. B4. It then went on to explain briefly the state of the law when *CHP I* and *II* were filed. *Ibid.* Thereafter, the body of the opinion, entitled "Res Judicata", points out that "[t]he developer's argument [that *CHP II* does not involve the same primary right as *CHP I*] can prevail only if the property right to be compensated by inverse condemnation damages was not involved in [*CHP I*]". *Id.*, p. B5. The Court of Appeal carefully examined what was actually litigated in *CHP I*; and, comparing it to *CHP II*, noted petitioner's reluctance to do so. The court then emphasized that petitioner had alleged a taking in *CHP I*, that the *CHP I* "apellate opinion shows that a central issue was whether the developer had acquired a vested right" and that the *CHP I* trial court "repeatedly rejected the notion that the developer had acquired any vested rights . . . ". *Id.*, p. B6. The Court of Appeal concluded: "Thus, the same primary right was at issue in [*CHP I*] which the developer seeks to reassert here . . . ". *Id*,. pp. B6-B7.

Thus, the entire petition evaporates in the face of the foregoing review of what was actually decided by the Court of Appeal below.

In sum, petitioner litigated and lost all of its federal and state constitutional claims (and their factual predicates) in *CHP I*. It has tried to relitigate those same federal constitutional claims and facts in federal court, and all federal courts found that they had already been adjudicated and are therefore barred by *res judicata*. *CHP III*. It has tried to relitigate the same state constitutional claims and facts in state court, and the state trial court and Court of Appeal below have found that they had already been adjudicated and are therefore barred by *res judicata*. *CHP II*.

Now, for the third time, petitioner importunes this Court to review its taking and vested rights claims on the previously rejected ground that this Court should address issues on inverse condemnation law not presented to the California courts earlier. Petition, Issues I and II. But every court that has so far consid-

ered the matter has concluded that the record clearly demonstrates that petitioner's taking claim and pertinent facts were actually presented to the state court in *CHP I* and adjudicated adversely to petitioner by that court. Thus, the only question this petition fairly presents is whether the Court of Appeal correctly applied California law of *res judicata*.

SUMMARY OF ARGUMENT

I. It is fundamental law that this Court does not have jurisdiction to decide questions of state law when reviewing decisions of state courts. *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590 (1875). 28 U.S.C. section 1257 limits this Court's authority to review only those state court decisions which raise issues of federal law.

II. There is no question of federal law presented in this case. In holding petitioner's claim to be barred by *res judicata*, the Court of Appeal below relied entirely on California law. Petitioner does not dispute this fact. Moreover, petitioner does not and could not dispute that the only substantive claim it pursued in this case was an issue of California law.

ARGUMENT

I. The United States Supreme Court Has No Jurisdiction to Decide Questions of State Law When Reviewing Decisions of State Courts.

It is fundamental law that this Court does not have jurisdiction to decide questions of state law when reviewing decisions of state courts. *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590 (1875). The statute authorizing Supreme Court appellate review of state court decisions only authorizes this Court to decide issues of federal law. 28 U.S.C. section 1257.

II. There Is No Question of Federal Law Presented in This Case.

There is an immediately evident and fatal flaw in the petition which belies its asserted presence of a federal question that might justify review of this matter by this Court (aside from this Court's

previous denial of review in *CHP III* which involved essentially the same issue as this petition). At no point does petitioner deny (nor, indeed, could it fairly do so) that the cause of action (or, in California *res judicata* terms, the primary right) involved in *CHP II* is identical to that involved in *CHP I*. The Court of Appeal below keenly and appropriately pinpointed this flaw: "While the developer is aware that our concern is whether different primary rights are involved in this action compared to [CHP I], it apparently prefers not to characterize the rights or the difference." Pet., App. B, p. B5.

A related fatal flaw is petitioner's failure to dispute (again it could not fairly do so) that the Court of Appeal below correctly stated and followed California law as to *res judicata*.[12]

These flaws are fatal because they impliedly concede that petitioner's asserted reason for granting the writ (i.e., to address the issue of the remedy for a taking) is a mirage.

Moreover, the record in this case is not appropriate to raise the issue of the correct remedy for a taking precisely because *CHP I* comclusively determined that no taking had occurred as noted by the Court of Appeal below. Pet. App. B, p. B7, fn. 2, and p. B8 (Conclusion). As this Court has held: "Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." *Agins v. City of Tiburon*, 447 U.S. 255, 263

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[12] Under settled California law, cited and relied on by the Court of Appeal (Pet., App. B, pp. B5-B8)

> "[a] valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action."

Slater v. Blackwood (1975) 15 Cal. 3d 791, 795. For *res judicata* purposes, California courts hold that

> "the violation of a single primary right constitutes a single cause of action . . . ".

Boccardo v. Safeway Stores, Inc., (1982) 134 Cal. App. 3d 1037, 1043; *Wulfjen v. Dolton* (1944) 24 Cal. 2d 891, 895. According to *Slater*, a

> " 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted . . . ".

Slater, supra, 15 Cal. 3d 794, 795.

(1979). Thus, it is irrevelant whether, as petitioner contends, a damage remedy did not exist for a taking when *CHP I* was pending. Pet., pp. 13-14.

Finally, it is spurious and trifling for petitioner to assert the damage remedy as an issue herein in the face of this Court's prior denial of review of the identical issue in the *CHP I* petition for certiorari in this Court. 454 U.S. 1074 (1981). (See Statement of the Case, *supra,* Part B.1, p. 6)

A. The California Court of Appeal Held Petitioner's Claim to Be Barred by the California Law of Res Judicata.

The California Court of Appeal, whose decision petitioner is challenging, held that petitioner's substantive claim was barred by *res judicata*. In so holding, the Court of Appeal relied entirely on California law. Pet., App. B, pp. B1-B8. Petitioner does not deny this fact.

No argument has been made that the application of settled principles of California *res judicata* law deprived petitioner of due process of law under the United States Constitution. In a vague and confusing statement, the petition appears to suggest that this Court should accept review to determine whether there is, as an abstract proposition, a due process right to damages for an inverse condemnation deprivation of vested rights to avoid an assertedly unjust application of *res judicata* in this case. This statement hopelessly and erroneously intermixes the due process and taking clause concepts. Whatever the statement is intended to mean, there are three reasons for rejecting its suggestion. First, petitioner raised a federal due process issue in *CHP I* (See paragraph 92 of the *CHP I* petition for writ of mandate at p. 170 of the Clerk's Transcript before the Court of Appeal below. Paragraph 92 also raised the taking issue under both federal and state constitutions. See fn. 3, supra.) As noted by the federal District Court in *CHP III* (App. B, p. A-19), the trial court and Court of Appeal in *CHP I* rejected the argument that the same acts of respondents which petitioner contends were a deprivation of vested rights for taking purposes resulted in a violation of due process. *Court House Plaza v. City of Palo Alto*, supra, 117 Cal. App. 3d 871, 883. Second, petitioner waived any possible right to

raise the suggestion in this case by failing to do so in its petition for writ of certiorari in *CHP III*. Third, the question of whether the application of California law of *res judicata* violated any of petitioner's federal rights "was not raised below, and hence is not open here". *Ellis v. Dixon*, 349 U.S. 458, 460 (1954).

B. The Single Substantive Claim in This Suit Was Based on State Law.

As described in the Statement of the Case, petitioner sought to litigate its federal claim for damages arising out of the asserted inverse condemnation in federal District Court in *CHP III*. In the present suit, brought in California Superior Court, petitioner "reserved" its federal claims so that they could be litigated in the federal District Court.[13] The only substantive claim ever presented to the California court in this suit was a claim for inverse condemnation under California law. Thus, even if the *res judicata* question could be put aside and this Court could legitimately be asked to address the issue of substantive law sought to be litigated in this case, that issue is only an issue of California law.

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[13] As described in the Statement of the Case, the District Court in *CHP III* found that these federal claims were barred by the California law of *res judicata*, as applied by the federal courts under 28 U.S.C. section 1738. If any such indication were needed, this federal decision indicates that the California courts in this case have fairly applied their own law of *res judicata*.

CONCLUSION

For over 8 years now, respondents have been put through extraordinary and unreasonable hoops by vexatious litigation and attempted relitigation of petitioner's legally insufficient claims. This Court has twice refused review. All state courts and all federal courts considering this case have uniformly rejected petitioner's claims. Petitioner now seeks to have this Court review the California Court of Appeal's decision resting entirely on California law. For the reasons and on the authorities set forth above, respondents respectfully request that this Court deny the petition.

DATED: Sept. 17, 1985

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(Appendices follow)

Appendix A

(ENDORSED)
FILED
OCT. 10 1978
JOHN KAZUBOWSKI
COUNTY CLERK

COURT HOUSE PLAZA COMPANY,
a limited partnership,
Petitioner,

vs.

No. P 32449

THE CITY OF PALO ALTO, a municipal corporation, et al.,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A petition for writ of mandamus has been filed herein by Petitioner. Respondents filed a timely return and the matter came on regularly before this Court for trial on Feburary 21, 1978, and succeeding dates. The record of the administrative proceedings was received into evidence, examined and considered by the Court and additional evidence, both oral and documentary, was admitted, examined and considered by the Court. Trial briefs and post-trial briefs have been filed by both parties and examined and considered by the Court. Both parties have orally argued the matter to the Court on March 30, 1978.

Following its examination and consideration of all of the foregoing matters, the Court rendered and filed its Memo of Decision on May 11, 1978.

Petitioner thereafter filed its request for findings of fact and conclusions of law, and the Court filed its order directing Respondents to prepare proposed findings of fact and conclu-

sions of law and a proposed judgment.

The Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Petitioner, Courthouse Plaza Company, a limited partnership, was and is the owner of the four-story office building located at 260 Sheridan Avenue, Palo Alto, California. The four-story building is in a block bounded by Sheridan Avenue on the east, Birch Street on the south, Grant Avenue on the west and Park Boulevard on the north.

2. Respondent, City of Palo Alto ("City") is a municipal corporation and a charter city.

3. The City Council of City ("Council") passed Ordinance No. 2224 on December 28, 1964, rezoning the subject property to a "Planned Community" ("PC") zoning district.

4. Ordinance No. 2224 became effective on January 28, 1965.

5. Ordinance No. 2224 contains a Development Plan and Development Schedule providing for two phases of construction. Phase 1 provided for start of construction of a four-story office building and a parking garage within two years of Council approval. Phase 2 provided for a start of construction of six additional floors of the four-story office building and additional levels on the parking garage by October 31, 1976.

6. In August, 1965, City was informed that a part of the subject property planned by Petitioner for the permanent parking structure approved by Ordinance No. 2224 might be required by the County of Santa Clara ("County") for a County road project (Page Mill-Birch Street realignment). From 1961 on, the County wanted to undertake this project to improve traffic safety on the County Expressway System, of which the

Birch Street off-ramp (adjacent to the parking structure site) was a part. The County initiated, designed and constructed improvements for that project, including the Birch Street off-ramp, and condemned the land for the same. The County retained control of the project and there is no evidence that the City had any control over the project.County did not actually determine its condemnation take from the parking structure site until 1969. Accordingly, in an attempt to alleviate the problem caused by this uncertainty so as to allow Petitioner to proceed on a temporary basis, the Council passed Resolution No. 3860 on December 13, 1965, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. Resolution No. 3860 approved construction of Phase 1 with 107 temporary offstreet parking spaces in lieu of the required permanent parking structure and gave Petitioner an extension of time until December 13, 1968, to start construction of the parking structure.

7. City Zoning Ordinance §18.68.070(a) allows PC zoning districts to be amended by resolution rather than ordinance.

8. In October, 1965, the County asked the City to make no allowance for improvement of approximately 11,500 square feet of the subject property at the intersection of Grant Avenue and Birch Street (the "Grant-Birch" parcel). The County made this request, since it intended to condemn that part of the subject property for expansion of the North Santa Clara County Courthouse and did not wish to pay for improvements thereto. Petitioner withdrew this parcel from its original project proposal prior to passage of Ordinance No. 2224, at the urging of a private merchants' group, thus facilitating the Courthouse expansion. There is no evidence that the City was responsible for the acqusition of the Grant-Birch parcel.

9. In 1966, the County commenced condemnation proceedings for acquisition of the Grant-Birch parcel. In the Spring of

1967, following a jury trial, the County acquired this parcel and Petitioner received just compensation for the taking.

10. On January 17, 1966, City issued a use permit for the Phase 1 four-story building, promptly following passage of Resolution No. 3860.

11. On June 14, 1966, City issued a building permit for construction of a four-story office building as approved by Ordinance No. 2224 and Resoultion No. 3860 (Exhibit 10).

12. Prior to June 14, 1966, Petitioner's architect, Albert A. Hoover, raised the question with Petitioner about the additional expense to be incurred in designing and building the four-story office building to accommodate a six-story addition when the possibility existed that only the first four stories would ever be constructed and, therefore, such additional expenses could not be recovered. Petitioner was willing to assume the risk of incurring such expense.

13. The four-story building authorized by the June 14, 1966, building permit (Exhibit 10) was completed in August, 1977. It was substantially leased by the Spring of 1968. It is a self-contained, functional structure even without the additional six floors, and has been occupied and used up to and including the present.

14. On December 11, 1967, Council plassed Resolution No. 4055, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224 and giving Petitioner an extension of time until December 13, 1969, to start construction of the parking structure.

15. Before February 15, 1968, and within six months after completion of the four-story building, Petitioner instructed its architect to proceed forthwith in preparing a complete set of working drawings for the six-story addition for Phase 2. The drawings were completed by the Fall of 1968.

16. As to the design of both Phase 1 and 2, the practice of Petitioner's architect was to apply changes in local and state laws, such as the Uniform Building Code, occurring after commencement of work on each of such phases.

17. Before the Phase 2 drawings were completed, the Council passed Resolution No. 4113 on May 6, 1968 (Exhibit 14) to further assist in the solution of the parking problem and to allow Petitioner to obtain permanent financing for Phase 2. This resolution amended the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. It rescinded Resolutions Nos. 3860 and 4055. It also continued the prior authorization of 107 surface parking spaces in lieu of the permanent parking structure and permitted use and occupancy of the four-story building with such surface parking. It provided further that "construction of the permanent parking structure shall start on or before October 31,1976"—the same date provided in Ordinance No. 2224 for start of construction of the six-story addition. Finally, Resolution No. 4113 provided that the six-story addition "shall remain unused and unoccupied until the parking structure is completed." Except as herein indicated, Resolution No. 4113 left all other sections of Ordinance No. 2224 as originally written. Resolution No. 4113 has never been amended.

18. By Fall, 1968, Petitioner had obligated itself to its architect to pay for the complete Phase 2 working drawings.

19. In August, 1969, after finally determining the engineering design requirements, County commenced condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment ("parking site acquisition"). Prior to this date, Petitioner was free to apply to City for a building permit to build the parking structure approved by Ordinance No. 2224 and

Resolution No. 4113, but decided not to do so for reasons of its own.

20. In the Fall of 1969, Petitioner ordered the structural steel and elevators for Phase 2 and submitted the Phase 2 plans for bid. On September 30, 1969, Petitioner's then managing general partner (W. G. Dunn) instructed its general contractor to "immediately commence placement of all subcontracts for the construction of the six-story building addition" (Exhibit R40), including at least structural steel, steel decking, exterior facade and elevators.

21. By its letter of September 30, 1969 (Exhibit R40), and by the acts of its general contractor pursuant thereto in placing contracts for structural steel (Exhibit R66) and elevators (Exhibit R44), Petitioner fully obligated itslef to pay for Phase 2 development costs prior to obtain financing to construct Phase 2 and prior to being issued a building permit for Phase 2 on February 16, 1970 (almost five months later).

22. Petitioner admits that it committed a mistake by not obtaining financing before committing the partnership to the obligation involved in paying for the steel and elevators for Phase 2, and that this mistake got the partnership into financial difficulties. This mistake was in no way attributable to Respondent or any of its officials or employees.

23. Petitioner's inability to obtain Phase 2 financing was not due to any act or acts of Respondents. Despite continuing efforts throughout 1968 and 1969, Petitioner was unable to obtain anything other than a verbal agreement from a lender in late 1969 which ultimately failed to materialize because the lender found itself overcommitted during that same period of time. Similarly, in the Fall of 1976, Petitioner was unsuccessful in its one effort to obtain Phase 2 financing because the lender's agent stated that time was too short to permit any substantive negotiations prior to the Phase 2 deadline of October 31, 1976, for start of construction.

24. On November 7, 1969, Petitioner executed a real estate purchase contract with Power Construction, Inc. ("Power") under which Petitioner acquired the right to purchase several parcels of land in the block south of and adjacent to the subject property. Petitioner considered the Power parcels as a possible alternative to provide the necessary offstreet parking for the six-story addition. Petitioner never requested a zone change to use the Power percels for such parking despite its awareness of the pending County condemnation for the parking site acquisition, and despite its further awareness of City requirements in this regard by virtue of its zone change application for an amendment to the PC Development Schedule ultimately passed by the Council in Resolution No. 4113 (Exhibit 117). Mr. Power testified that the City never interfered with his contractual relations with Petitioner. Because of Petitioner's inability to obtain Phase 2 financing, the Power parcels were permitted to revert to Power late in 1971, and a quit-claim was executed by Petitioner in 1973.

25. Late in 1969, a controversy between Petitioner and City arose over the installation of a smokeproof tower. Earlier in 1965, City had resolved a similar dispute in Petitioner's favor within three weeks of the date it was raised by permitting construction of Phase 1 with an interior smokeproof tower. The 1969 controversy lasted about two months and was resolved in Petitioner's favor on February 2, 1970, by issuance of a building permit for Phase 2 using a mechanically-ventilated interior smoketower (Exhibits 17 & 19). An inter-office communication from the city attorney's office to the city manager (Exhibit 18) does not show that the City recognized that Petitioner has a vested right to *construct* Phase 2 but instead only a vested right to a *method* of construction, namely an interior smokeshaft in the existing four-story building. The refernece to vested rights in Exhibit 18 does not apply to construction of Phase 2.

26. On March 30, 1970, City issued Petitioner a use permit following an appeal from the City zoning administrator's refusal to issue the use permit on the ground that the proposed six-story addition would create a building approximately 14 feet (or 11 percent) higher than the building approved by the PC zoning in Ordinance No. 2224 and that the proposed addition was a variation not within reasonable limits of the zoning administrator's administrative discretion to approve. The use permit was granted within approximately six weeks after Petitioner applied for it.

27. On March 11, 1970, during a hearing on its appeal from the use permit denial, Petitioner told the City Planning Commission ("Commission") that it would not be building a parking structure, that it had options on sufficient land to provide the required Phase 2 parking, and that it realized it would have to provide parking before it could use and occupy the six-story addition (Exhibit 20, p. 83).

28. On March 30, 1970, at the hearing at which the Council approved the Phase 2 use permit, City advised Petitioner that the PC Development Plan required construction of the parking structure before October, 1976 (Exhibit 21, p. 238).

29. On April 3, 1970, the City staff advised Petitioner in writing that it should file plans in the near future for "consideration of a change of the approved Development Plan which now requires an off-street parking structure" (Exhibit 128).

30. On April 13, 1970, the Council amplified the minutes of its March 30, 1970, meeting to reflect that, as to Phase 2, the "parking requirements are expected to be consistent with the previously approved plan" approved by Ordinance 2224 (Exhibit 22).

31. City granted Petitioner's request of May 22, 1970, to extend the Phase 2 building permit to July 1, 1970 (Exhibit R4).

32. The Phase 2 building permit (Exhibit 19) expired on July 1, 1970, because of Petitioner's inability to obtain financing.

33. City granted Petitioner's request to extend the Phase 2 use permit to March 30, 1972.

34. The Phase 2 use permit expired on March 30, 1972, because of Petitioner's inability to obtain financing.

35. No construction work was ever undertaken on either the Phase 2 six-story additon or the permanent parking structure.

36. In August, 1970, the County of Santa Clara completed condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment. The County acquisition was based on a Stipulation for Judgment executed between Petitioner and County (Exhibit R5). County commenced this condemnation proceeding in August, 1969, approximately one month before Petitioner ordered the steel and elevators for Phase 2 (Exhibit R40). Petitioner received just compensation for this taking, including certain excess lands deeded to it by the County contiguous to the parking structure site.

37. On October 6, 1972, at Petitioner's request, City staff members met with Petitioner for the purpose of discussion construction requirements and processing of Phase 2. There was no intent to delay, hinder or thwart Petitioner in any way on the part of the City staff members present at the October 6, 1972, meeting, or on the part of any other City official, at that time or at any other time.

38. Approximately one year after the Phase 2 use permit expired (February 27, 1973), Petitioner applied for a new use permit for the Phase 2 six-story addition, but withdrew the application on March 20, 1973, without it being acted upon by the City. Petitioner intended to resubmit its application a few

months thereafter, but did not do so because it lost its chief tenant which decided to move to a new facility to achieve its own corporate identity. There was no evidence that the tenant vacated because of Petitioner's inability to provide more space for it in the contemplated six-story addition.

39. On September 24, 1973, the City passed Ordinance No. 2475 (Exhibit R8) placing a 50-foot height limit on buildings in certain zoning districts but not Planned Community zones, such as applies to the subject property.

40. The City passed various ordinances adopting current editions of various construction codes which were applicable to Phase 2. Among these were Ordinance No. 2436, passed on May 27, 1968, adopting the 1967 editions of the Uniform Building, Electrical, Mechanical and Plumbing Codes (Exhibit R3), Ordinance No. 2605, passed on June 7, 1971, adopting the 1970 editions of the Uniform Building and Mechanical Codes (Exhibit R6), and Ordinance No. 2809, passed on August 26, 1974, adopting the 1973 editions of the Uniform Building, Mechanical and Housing Codes.

41. For a period of approximately three years, from the date of its withdrawal of its Phase 2 use permit application on March 20, 1973, Petitioner did nothing about further construction on Phase 2 until June 30, 1976, when it applied for a zone change with respect to the parking problem and also for new uses not previously permitted (Exhibit 225). Despite being told by the City's zoning administrator on March 31,1975, that the City might agree to a reduction of parking spaces, Petitioner waited for more than a year to submit its zone change application. Petitioner did not start working in earnest on the parking problem until October or November, 1975.

42. Petitioner's zone change application of June 30, 1976, was defective in that it included a portion of property not owned by Petitioner and also a portion of the City street on

Sheridan Avenue. No City staff member told Petitioner that such an application would be approved either prior to or after its submittal.

43. Pursuant to §18.68.070(a) of the City Zoning Ordinance governing PC District Regulations, zone changes in a PC district are considered the same as changes in the City zoning map and are in accordance with the general rezoning procedures set forth in City Zoning Ordinance Chapter 18.98. Section 18.98.020 limits zone change applications to the Council or Commission or "a property owner." Section 18.98.030 permits zone change applications to include non-owned property only if it includes the written consent of the owner of record of legal title to make such application.

44. Petitioner's June 30, 1976, zone change application did not include the written consent of the owner of record of legal title to either the privately-owned property (Mrs. Pierson) or the City property in Sheridan Avenue.

45. Petitioner's June 30 zone change application did not request a hearing date before the Commission until August 25, 1976.

46. Almost nine years elapsed from the date Petitioner completed the four-story building on August 17, 1967, to August 11, 1976, when it submitted a request for a three-year extension of the Phase 2 deadline of October 31, 1976, contained in the PC Development Schedule in Ordinance No. 2224 and Resolution No. 4113.

47. On August 25, 1976, the Commission adopted a motion recommending to the Council that the three-year request be denied. This procedure followed the provisions of PC District Regulations set forth in Zoning Ordinance §18.68.080D. Following the Commission's recommendation of denial, Petitioner withdrew its three-year request and, instead, filed an application for a use permit for Phase 2 on August 30, 1976.

48. On August 31, 1976, Petitioner submitted an application for a building permit for the six-story addition based upon the building plans for which a permit had been issued in 1970. These plans had not been revised to meet current code requirements. The City, subsequent to the expiration of the 1970 building permit for the six-story addition, had adopted the 1970 and 1973 editions of the Uniform Building Code and other construction codes. The August 31, 1976, application for a building permit for Phase 2 did not comply with those codes.

49. The City building inspector refused to issue a building permit for the six-story addition on three grounds: (1) the plans submitted did not conform to then existing codes; (2) no use permit had been issued for the six-story addition as required by §18.68.040 of the PC District Regulations and (3) Petitioner's zone change application of June 30, 1976 (for parking and new uses) and August 11, 1976) for time extension) were then pending.

50. On September 8 and September 21, 1976, respectively, at Petitioner's request, City staff members met with Petitioner and its architect to discuss Phase 2. On September 8, 1976, City staff members advised Petitioner to resubmit revised building plans to conform to current codes. No revised plans were submitted until October 15, 1976, 16 days before the October 31, 1976, deadline for start of construction.

City staff members further advised Petitioner that City would submit the revised plans to the International Conference of Building Officials (ICBO) in Whittier, California, for plan check because (1) there were numerous building code changes that required extensive review, (2) the revisions were complex, and (3) under then existing time constraints the City building inspector could not undertake the review and approval.

51. On October 1, 1976, Petitioner filed a request with the Commission to amend the Development Schedule by requesting

a one-year extension for start of construction of the six-story addition.

52. On October 20, 1976, Petitioner submitted an extensive letter to the Commission in support of its one-year extension request.

53. On October 27, 1976, the Commission held a public hearing in which all relevant issues were discussed by Petitioner, its counsel, members of the public, the City staff and the Commission (Exhibit 48). At the conclusion of the hearing, the Commission passed a motion recommending to the Council that the one-year request be denied.

54. On October 28, 1976, the City building inspector denied Petitioner's request for an interim building permit on the grounds that no use permit had yet been issued for Phase 2 and that no plans for construction of a parking structure had been submitted.

55. On December 7, 1976, the Council held a public hearing on Petitioner's one-year request. The request for extension was submitted to lengthy debate in which all relevant issues were discussed and in which Petitioner and its counsel, members of the public, members of the City STaff and Council members fully participated. The Chairperson of the Planning Commission described the Commission's reasons for denying the extension. These were: the unresolved parking problem, the ten-year length of time for completing the development, the advantage over others in granting an extension, the changed conditions of the area and height limitations that could be considered. Council members discussed and considered such subjects as the impact of the County condemnation action on the parking requirements, the economics of the project, building height limits, environmental impact reports, delays in completing the project, the interests of the community, the general changes in the city's comprehensive plan. The pros and cons from public

participants discussed added jobs and taxes to be derived from the building's construction on the one hand to the need for an environmental report and general opposition to the building and its proposed height on the other.

56. The Council thoroughly considered Petitioner's request at its meeting. The discussions and deliberations were complete and unhurried. The factual data the Council had before it fairly represented both sides of the issues. Petitioner was asked on two separate occasions if it had been dealt with in good faith by City. Both times the answer was affirmative.

57. On December 7, 1976, the Council following the hearing and its deliberations, denied Petitioner's request for a one-year extension. Pursuant to PC District Regulations §18.68.070(a) and 18.68.080, the Development Schedule is part of the Development Plan which, in itself, is the PC zoning. Any request to change to the Development Schedule is a request for a rezoning or an amendment to the PC zoning as established by Ordinance No. 2224.

58. At the time the Council denied Petitioner's one-year request, no building permit had been issued for construction of the six-story addition or the parking structure. The previously issued building permit expired on July 1, 1970, and the use permit on March 30, 1972.

59. There was never any act or intent on the part of any of Respondents to obstruct, hinder or delay Petitioner.

60. There was no deliberate or willful attempt to delay, hinder or obstruct Petitioner in the completion of either Phase 1 or Phase 2.

61. Petitioner did not commence construction on Phase2by virtue of expending money to overbuild Phase 1 to accommodate it.

62. Respondents have acted conscientiously and in good

faith with Petitioner at all times.

63. None of Respondents' actions have been unreasonable, unlawful, arbitrary or discriminatory.

CONCLUSIONS OF LAW

From the foregoing findings of act, the Court makes the following conclusions of law:

1. Ordinance No. 2224 was a proper legilsative exercise of the police power through zoning. Zoning is not a contract.

2. Ordinance No. 2224 established a specially enacted zoning for the subject property which, from its effective date, prescribed a fixed, limited time period for start of construction for both Phase 1 and Phase 2.

3. There is nothing in Ordinance No. 2224, or law in general, which provided that the completion of Phase 1 guaranteed or vested any right to complete Phase 2.

4. The appropriate and applicable form of mandamus in this action is under California Code of Civil Procedure §1085. The City's actions in passing Ordinance No. 2224, Resolutions 3860 and 4055, and in considering Petitioner's requests for time extensions were legislative functions, not administrative orders or decisions which latter functions are reviewable under Code of Civil Procedure §1094.5.

5. The City Council in considering and deciding upon the request in this case to extend the ordinance was not acting in a quasi-judicial capacity but was performing a legislative function subject only to traditional mandamus review.

6. The decision regarding staff issuance of use permits under the City's PC zoning regulations is both ministerial in character and supplements the PC legislative process reviewable under Code of Civil Procedure §1085.

7. The decision whether or not to issue a building permit

involves a ministerial act reviewable under Code of Civil Procedure §1085.

8. The scope of review by the trial court in traditional mandamus actions (section 1085) requires only an examination into whether the action taken was arbitrary, capricious or entirely lacking in evidentiary support.

9. A city council in amending a zoning ordinance is not required to make express findings of fact as to the public purpose of the ordinance or its relation to the police power. Council members are not required to articulate for the record all of the reasons and motives behind their decisions.

10. No fundamental vested right was ever acquired by Petitioner. Absent such a right, the test of the City Council's action was whether there was substantial evidence to support it.

11. The action taken by the Council in denying the one-year request was supported by more than substantial evidence.

12. Petitioner did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase 1 to accommodate it or in any other respect.

13. Petitioner had not at any time acquired vested rights to a building permit to construct Phase 2; therefore, the Council's denial of the one-year extension did not constitute a deprivation of vested rights.

14. There is no basis for application of the doctrine of estoppel against Respondents.

15. None of Respondents' actions have been unreasonable, unlawful, arbitrary, discriminatory, malicious nor void, nor have such resulted in any denial of due process or equal protection of the laws.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 6, 1978.

JUDGE JOHN R. KENNEDY

Judge of the Superior Court

Appendix B

Original
FILED
June 4 1982
William Whittaker
Clerk, U.S. District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership,	)	
	)	No. C-81-4537 SC
Plaintiff,	)	
-vs-	)	
	)	ORDER GRANT-
THE CITY OF PALO ALTO, a municipal corporation, et al.,	)	ING MOTION TO DISMISS
	)	
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

Plaintiff, a building developer, seeks damages and equitable relief for the actions of the Palo Alto City Council and its Planning Commission in denying building and use permits for the second phase in the construction of a ten-story office building and in denying a one-year extension of the building's development schedule provided by a municipal zoning ordinance. Because plaintiff's action is precluded by the *res judicata* effect of a prior judgment in state court, plaintiff's action must be dismissed.

After the city council's denial of plaintiff's application for the necessary permits and extension of time, plaintiff sought a writ of mandamus from the California Superior Court. Plaintiff was denied relief in superior court and on appeal. *See Court House Plaza Co. v. City of Palo Alto*, 17 Cal. App. 871, 173 Cal. Rptr. 161 (1981). Plaintiff now seeks relief on six causes

of action: federal and state constitution "taking" claims (inverse condemnation); federal and state constitution equal protection and due process claims; a federal civil rights claim; and a declaratory judgment claim. The latter two claims rest on the constitutional violations alleged in the first four, and contain no independent factual allegations.

The doctrine of *res judicata* prevents a plaintiff from relitigating claims adjudicated in another prior proceeding. The Ninth Circuit has extended *res judicata* to ban federal constitutional claims, whether or not asserted in state court,

> where the federal constitutional claim is based on the same asserted wrong as was the subject of [the] state action, and where the parties are the same.

Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir. 1975).

The federal claims here are based on the same alleged wrongful acts which formed the basis of plaintiff's state court mandamus action. Also, plaintiff has sued all the same defendants with the exception of one individual named in the state court proceeding. Consistent with *Scoggin*, plaintiff's claims for declaratory relief, for relief under the civil rights act, and for the alleged federal constitutional violations on which those claims are barred by *res judicata*.

Plaintiff's citation of *Gallagher v. Frye*, 631 F. 2d 127 (9th Cir. 1980) is inapposite. The court in *Gallagher* distinguished *Scoggin* on the facts. In *Scoggin*, plaintiff sought to set aside a foreclosure sale in federal court, after being unable to successfully challenge it in state court. In *Gallagher*, however, plaintiff's initial state court mandamus proceeding attempted to enforce an administrative order of a civil service board against a museum. Plaintiff's federal claim addressed defendant's underlying act of employment termination. The essential issue in the state court proceeding was "the jurisdictional authority of of the state administrative agency." *Id.* at 129-30. The issue in the federal court proceeding was whether the alleged wrongful conduct of the defendant museum violated plaintiff's civil rights.

In the instant case, the alleged violations of the federal constitution have been adjudicated in state court. The state court of appeal upheld the trial court's findings that the denial of the time extension did not deprive plaintiff of equal protection or due process of law, *Court House Plaza v. City of Palo Alto*, 117 Cal. App. 3d at 883, and that the city's adverse zoning action did not constitute a "taking" requiring compensation. *Id.* at 888. Furthermore, even assuming that these constitutional claims had not been raised, having had the ability to raise the federal claims in the state court proceedings bars this court from adjudicating them now. *Scoggin v. Schrunk*, 522 F. 2d at 437.

Finally, when a district court, as in this case, dismisses all federal claims prior to trial, "the proper exercise of discretion requires dismissal" of the state claims. *Wren v. Sletten Construction Co.*, 654 F. 2d 529, 536 (9th Cir. 1981). Such claims should be dismissed for want of federal jurisdiction. *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 261 (9th Cir. 1977).

In accordance with the foregoing, it is hereby ordered that defendants' motion to dismiss plaintiff's complaint is granted.

Dated: June 4, 1982

SAMUEL CONTI
United States District Judge

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURT HOUSE PLAZA COMPANY, a limited partnership,	)	
Plaintiff-Appellant,	)	
v.	)	No. 82-4393
THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney,	)	DC #CV-81-4537-SC MEMORANDUM

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted April 14, 1983

Before: KILKENNY, SCHROEDER, and BOOCHEVER, Circuit Judges.

The district court's dismissal, on res judicata grounds, of this federal civil rights action must be affirmed under *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1979).

Affirmed.

Appendix D

Ropers, Majeski, Kohn, Bentley, Wagner & Kane
A Professional Corporation
Crocker Plaza, Suite 820
84 West Santa Clara Street
San Jose, California 95113
(408) 287-6262
Attorneys for defendants The City of Palo Alto and each individually named defendant

In the Superior Court of the State of California
in and for the County of Santa Clara

Civil No. P33070

Court House Plaza Company, a limited partnership,
Plaintiff,

vs.

The City of Palo Alto, a municipal corporation, Stanley L. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John J. Berwald, Anne R. Witherspoon, John V. Bears, Councilmen, Peter R. Carpenter, Mary R. Gordon, William E. Green, Jay W. Mitchell, Emily M. Renzel, Anne Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Napthali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney and Louis G. Green, Assistant City Attorney,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS AND MOTION TO STRIKE

Date: Monday, April 26, 1982
Time: 9:30 a.m.
Dept: One
Est. Length of Hearing: 30 Mins.

MEMORANDUM OF POINTS AND AUTHORITIES

Page

XIII. SINCE AN ACTUAL CONTROVERSY NO LONGER EXISTS, PLAINTIFF IS NOT ENTITLED TO DECLARATORY RELIEF 21

XIV. CONCLUSION 21

EXHIBITS

A. Claim against City of Palo Alto, March 3, 1977.

B. Complaint for Damages, filed September 22, 1977, Action Number P33070.

C. Petition for Writ of Mandamus, filed May 23, 1977, Action Number P32449.

D. Memo of Decision, Action Number P32449.

E. Findings of Fact and Conclusions of Law, Action Number P32449.

F. Judgment Denying Peremptory Writ of Mandate, Action Number P32449.

G. *Court House Plaza vs. City of Palo Alto* (1981) 117 C.A.3d 871.

H. Denial of Petition for Rehearing in Court of Appeals.

I. Denial of Hearing by California Supreme Court.

J. Notice of Appeal to U.S. Supreme Court.

K. Dismissal of Appeal and Denial of Certiorari by United States Supreme Court.